

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

THOMAS SEGUNDO, JR., )  
Plaintiff, )  
v. ) Case No. C05-1768-MJP-JPD  
JO ANNE B. BARNHART, Commissioner ) REPORT AND RECOMMENDATION  
of Social Security Administration, )  
Defendant. )  
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)

## I. INTRODUCTION AND SUMMARY CONCLUSION

18 Plaintiff Thomas Segundo, Jr., appeals a final decision of the Commissioner of the  
19 Social Security Administration (“Commissioner”) that denied plaintiff’s application for  
20 Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act after a hearing  
21 before an administrative law judge (“ALJ”). The parties agree that the ALJ’s decision was not  
22 free from legal error and that some form of remand is appropriate. For the reasons set forth  
23 below, the Court recommends that the ALJ’s decision be reversed and remanded for further  
24 administrative proceedings. On remand, the ALJ should reassess the medical evidence,  
25 reevaluate plaintiff’s residual functional capacity, and apply the appropriate remaining steps of  
26 the sequential evaluation process.

**REPORT AND RECOMMENDATION**  
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## II. FACTS AND PROCEDURAL HISTORY

Plaintiff is a fifty-five-year-old man. AR 199. He has a formal education through the eleventh grade, and has also received vocational training as a welder. AR 87, 227. From 1975 until 1997, plaintiff consistently worked six-day work-weeks as a construction welder. AR 208, 222. In October 1997, plaintiff underwent back surgery for a bulging disc, and subsequently experienced complications that led to symptoms of dizziness and loss of equilibrium. AR 24, 322-23. Plaintiff has not worked since that time.

On November 14, 2001, plaintiff filed an application for DIB.<sup>1</sup> AR 199-201. He alleged disability beginning on October 1, 1997, as a result of diabetes, dizziness, fatigue, short-term memory loss, pain and weakness in his right elbow and both legs, hepatitis C, high blood pressure, and accelerated heartbeat. AR 199, 221. Plaintiff subsequently amended his onset date to May 8, 2000. AR 23, 401, 411. Plaintiff's application was denied both initially and on reconsideration. AR 171-78.

Plaintiff requested a hearing and on May 10, 2004, an administrative hearing was held before an ALJ. AR 179, 413-50. On February 26, 2005, an ALJ issued a decision finding plaintiff not disabled. AR 21-32. In particular, the ALJ found that plaintiff retained the ability to perform a full range of light work, and relying upon the Medical-Vocational Guidelines, found that plaintiff was able to perform other work that exists in significant numbers in the national economy. AR 31.

Plaintiff appealed the decision and submitted additional evidence, a declaration from Alan Langman, M.D., a non-examining physician, who opined that plaintiff met listing 2.07,

<sup>1</sup>This was plaintiff's second application for DIB. Plaintiff filed a first application for DIB on February 5, 1998, alleging disability beginning on October 1, 1997, as a result of dizziness, numbness in his lower extremities, and back and leg pain. AR 77-79, 81. After these applications were denied initially and upon reconsideration, plaintiff requested an administrative hearing. AR 59-68. On April 22, 1999, an ALJ issued a decision finding plaintiff not disabled. AR 36-44. Plaintiff did not seek further review of this application and has not sought to reopen it in this suit.

01 for Disturbances of Labyrinthine Function Including Meniere's Disease. AR 406-12. The  
02 Appeals Council denied plaintiff's request for review. AR 8-11. Thus, the ALJ's February 26,  
03 2005, decision serves as the ALJ's final decision for purposes of judicial review. On October  
04 20, 2005, plaintiff filed this civil action challenging the final decision. Dkt. No. 1.

05 **III. JURISDICTION**

06 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. §  
07 405(g) (2005).

08 **IV. STANDARD OF REVIEW**

09 The Court may set aside the Commissioner's denial of social security benefits when the  
10 ALJ's findings are based on legal error or not supported by substantial evidence in the record  
11 as a whole. *See* 42 U.S.C. § 405(g); *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993);  
12 *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996). Substantial evidence is defined as  
13 more than a mere scintilla but less than a preponderance; "it is such relevant evidence as a  
14 reasonable mind might accept as adequate to support a conclusion." *Magallanes v. Bowen*,  
15 881 F.2d 747, 750 (9th Cir. 1989) (internal citations and quotations omitted). The ALJ is  
16 responsible for determining credibility, resolving conflicts in medical testimony, and resolving  
17 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Where the evidence is  
18 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that  
19 must be upheld. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (internal citations  
20 omitted).

21 **V. EVALUATING DISABILITY**

22 As the claimant, Mr. Segundo bears the burden of proving that he is disabled within  
23 the meaning of the Social Security Act. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
24 1999) (internal citations omitted). Disability is defined as the "inability to engage in any  
25 substantial gainful activity by reason of any medically determinable physical or mental  
26 impairment, which can be expected to result in death, or which has lasted or can be expected

01 to last for a continuous period of not less than twelve months[.]” 42 U.S.C. §§ 423(d)(1)(A),  
02 1382c(a)(3)(A). A claimant is disabled only if his impairments are of such severity that he is  
03 unable to do his previous work, and cannot, considering his age, education, and work  
04 experience, engage in any other substantial gainful activity existing in the national economy.  
05 See 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); *see also Tackett v. Apfel*, 180 F.3d 1094,  
06 1098-99 (9th Cir. 1999).

07 The Social Security regulations set out a five-step sequential-evaluation process for  
08 determining whether a claimant is disabled within the meaning of the Social Security Act.  
09 See 20 C.F.R. §§ 404.1520, 416.920. At step one, the claimant must establish that he is not  
10 engaging in any substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). If the  
11 claimant establishes that he has not engaged in any substantial gainful activity, the  
12 Commissioner proceeds to step two. At step two, the claimant must establish that he has one  
13 or more medically-severe impairments, or combination of impairments, that limit his  
14 physical or mental ability to do basic work activities. If the claimant does not have such  
15 impairments, he is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does  
16 have a severe impairment, the Commissioner moves to step three to determine whether the  
17 impairment meets or equals any of the listed impairments described in the regulations. 20  
18 C.F.R. §§ 404.1520(d), 416.920(d). A claimant who meets or equals one of the listings for  
19 the required twelve-month-duration requirement is disabled. *Id.*

20 When the claimant’s impairment neither meets nor equals one of the impairments  
21 listed in the regulations, the Commissioner must proceed to step four and evaluate the  
22 claimant’s residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). The  
23 Commissioner then uses the RFC to determine whether the claimant can still perform the  
24 physical and mental demands of his past relevant work. 20 C.F.R. §§ 404.1520(f),  
25 416.920(f). If the claimant is not able to perform his past relevant work, the burden shifts to  
26 the Commissioner at step five to show that the claimant can perform some other work that

01 exists in significant numbers in the national economy, taking into consideration the  
02 claimant's RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g),  
03 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the claimant is  
04 unable to perform other work, then the claimant is found disabled and benefits may be  
05 awarded.

## 06 VI. DECISION BELOW

07 On February 26, 2005, the ALJ issued a decision finding:

- 08 1. The claimant meets the nondisability requirements for a period of  
09 disability and Disability Insurance Benefits set forth in Section 216(i) of  
the Social Security Act and is insured for benefits through  
December 31, 2002.
- 10 2. The claimant has not engaged in substantial gainful activity since the  
11 alleged onset of disability.
- 12 3. The claimant's depression is not a "severe" impairment resulting in  
functional limitation.
- 13 4. The claimant's dizziness, degenerative disc disease of lumbar spine, and  
14 Diabetes Mellitus are considered "severe" based on the requirements in  
the Regulations 20 CFR § 404.1520(c).
- 15 5. These medically determinable impairments do not meet or medically  
16 equal one of the listed impairments in Appendix 1, Subpart P,  
Regulation No. 4.
- 17 6. The undersigned finds the claimant's allegations regarding his  
18 limitations are not totally credible for the reasons set forth in the body  
of the decision.
- 19 7. The claimant has the residual functional capacity to perform the full  
20 range of light work.
- 21 8. The claimant's medically determinable impairments prevent him from  
22 performing his past relevant work.
- 23 9. The claimant's age, education, work experience, and residual functional  
24 capacity indicate he is capable of making an adjustment to other work  
that exists in significant numbers in the national economy.
- 25 10. The claimant was not under a "disability" as defined in the Social  
26 Security Act, at any time through the date of the decision (20 CFR  
§ 404.1520(f)).

01 AR 31-32.

02 **VII. ISSUES ON APPEAL**

03 The parties agree that the ALJ's decision was not free from legal error and that a  
04 remand is appropriate. *See* Dkt. Nos. 12, 14. The only remaining issue is whether to remand  
05 for an immediate award of benefits or for further administrative proceedings.

06 **VIII. DISCUSSION**

07 The Court may direct an award of benefits where "the record has been fully developed  
08 and further administrative proceedings would serve no useful purpose." *McCartey v.*  
09 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen*, 80 F.3d at 1292). The Court  
10 may find that this occurs when:

11 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the  
12 claimant's evidence; (2) there are no outstanding issues that must be resolved  
13 before a determination of disability can be made; and (3) it is clear from the  
14 record that the ALJ would be required to find the claimant disabled if he  
15 considered the claimant's evidence.

16 *Id.* at 1076-77; *see also* *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that  
17 erroneously rejected evidence may be credited when all three prongs are met).

18 **A. The ALJ Committed Legal Error.**

19 The first step for determining whether a case should be remanded for an immediate  
20 award of benefits or for further administrative proceedings is to assess whether the ALJ  
21 provided legally sufficient reasons for rejecting plaintiff's evidence. *McCartey*, 298 F.3d at  
22 1076. The Commissioner has conceded that the ALJ's decision is "not free from legal error"  
23 and that remand is appropriate. Dkt. No. 14 at 4 & n.1. Hence, the parties agree that the ALJ  
24 committed legal error. The first step of the remand analysis is satisfied.

25 Typically, the Court will analyze which of plaintiff's assigned errors were erroneous or  
26 not supported by substantial evidence based upon the arguments in the parties' briefs.  
27 However, the defendant has not identified the specific legal deficiencies in the ALJ's decision,  
28 nor seriously contested the plaintiff's assertions of error. Rather, defendant has suggested

01 general points for reconsideration. *See* Dkt. No. 14. Given the ambiguity of the  
02 Commissioner's response, the ALJ should re-examine each of the assignments of error  
03 identified by plaintiff, and should specifically: (1) reevaluate plaintiff's RFC, making specific  
04 findings as to what non-exertional limitations, if any, exist; (2) reassess plaintiff's credibility  
05 and provide clear and convincing reasons with proper citation to the record if he wishes to  
06 reject plaintiff's testimony; (3) reassess the lay-witness testimony of plaintiff's wife; (4)  
07 reevaluate the medical evidence, especially the opinions of Drs. Ho and Langman; (5) apply,  
08 to the extent necessary, the special technique for evaluating mental impairments described in  
09 20 C.F.R. § 404.1520a; and (6) take other testimony or evidence and apply all other relevant  
10 steps necessary to determine accurately whether plaintiff is disabled.

11           B.     Outstanding Issues Still Remain.

12           The second step for determining whether a case should be remanded for an immediate  
13 award of benefits or for further administrative proceedings is to assess whether there are any  
14 outstanding issues that must be resolved before a determination of disability can be made.  
15 *McCartey*, 298 F.3d at 1076. Here, several outstanding issues remain. For instance, the  
16 ALJ's RFC finding was ambiguous. The formal "Findings" section of the decision stated  
17 that plaintiff retained the RFC to "perform the full range of light work." AR 31. Yet, in the  
18 "Evaluation of the Evidence" section, the ALJ indicated that plaintiff had non-exertional  
19 limitations that "limited [him] with respect to unprotected elevations, dangerous machinery,  
20 and noise[.]" AR 31. These limitations were apparently related to plaintiff's dizziness  
21 impairment. It is unclear why the ALJ did not include these restrictions in his RFC finding  
22 nor explain why the restrictions were omitted.

23           Additionally, an issue remains regarding the application of the Medical-Vocational  
24 Guidelines. 20 C.F.R. Pt. 404, Subpt. P., App. 2. The ALJ found that rule 202.18 directed a  
25 finding of non-disability. AR 31. The ALJ's RFC finding impacts whether a plaintiff can  
26 perform "substantially all" of the functions necessary to qualify for a given exertional

01 category of work — here “light” work — for purposes of applying the Medical-Vocational  
02 Guidelines. *See* SSR-83-11, SSR 83-14. The ALJ, however, failed to explain why plaintiff’s  
03 non-exertional limitations did not impact his ability to perform substantially all of the  
04 activities of light work. If plaintiff’s non-exertional limitations limit his functional abilities,  
05 it may be necessary for the ALJ to call a vocational expert to determine plaintiff’s ability to  
06 perform his past relevant work, and other work. SSR 83-14. Moreover, as discussed above,  
07 issues remain regarding the impact of plaintiff’s mental impairments, his credibility, and his  
08 wife’s credibility. *See, supra*, Section A.

C. It Is Not Clear From the Record That the ALJ Would Be Required to Find the Plaintiff Disabled.

The final step for determining whether a case should be remanded for an immediate award of benefits or for further administrative proceedings requires the Court to assess whether the ALJ would be obligated to find the claimant disabled if he considered the erroneously rejected evidence. *McCartey*, 298 F.3d at 1076-77. This prong is actually a subcategory of the second prong. *Harman*, 211 F.3d at 1178.

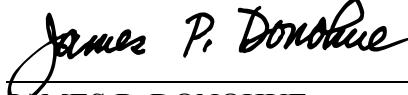
Plaintiff argues that the declaration of Dr. Langman, which opines that plaintiff satisfies Listing 2.07, requires a finding of disability. Dkt. No. 15 at 2; AR 406-11. On this record, however, a finding of disability based on Dr. Langman's opinion alone is not warranted. Dr. Langman is a non-examining physician. His opinion is one of many medical opinions found in a nearly 500-page record. While his opinion is entitled to some weight, other evidence, such as the opinions of Drs. Ho, Horton, and Fu, suggests that plaintiff may retain more ability work. AR 313-18, 322-26, 332-37. The Court, however, will not weigh that evidence. That is the ALJ's task on remand.

## IX. CONCLUSION

For the reasons discussed above, this case should be reversed and remanded for further administrative proceedings not inconsistent with this report and recommendation. In

01 particular, the ALJ should reassess the medical evidence, recalculate plaintiff's RFC, and take  
02 any other steps necessary to completely and accurately determine plaintiff's eligibility for DIB.  
03 A proposed order accompanies this report and recommendation.

04 DATED this 14th day of June, 2006.

05   
06 JAMES P. DONOHUE  
07 United States Magistrate Judge  
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